No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J Cellars (a copartnership),

Appellants,

vs.

PARK, BENZIGER & CO., INC. (a corporation),

Appellee,

and

PARK, BENZIGER & CO., INC. (a corporation),

Cross-Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J Cellars (a copartnership),

Cross-Appellees.

CROSS-APPELLANT'S REPLY BRIEF.

ALFRED F. BRESLAUER,
111 Sutter Street, San Francisco 4, California,
THELMA S. HERZIG,
111 W. 7th Street, Los Angeles 14, California,
M. MITCHELL BOURQUIN,
Crocker Building, San Francisco 4, California,
GEORGE OLSHAUSEN,
Mills Tower, San Francisco 4, California,
Attorneys for Plaintiff and Cross-Appellant.

Subject Index

Table of Authorities Cited

Cases

Codes and Texts

Rules

No. 10,823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J Cellars (a copartnership), *Appellants,*
vs.
PARK, BENZIGER & CO., INC. (a corporation), *Appellee,*
and
PARK, BENZIGER & CO., INC. (a corporation), *Cross-Appellant,*
vs.
PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J Cellars (a copartnership), *Cross-Appellees.*

CROSS-APPELLANT'S REPLY BRIEF.

Cross-appellees have filed a brief which gives the impression that counsel took a quick glance at our brief, and then attempted to write a reply without

having really read either cross-appellant's brief or the relevant law.

We answer counsel's points in order.

I. THE CIRCUIT COURT OF APPEALS HAS JURISDICTION OF THE APPEAL.

Counsel first object to the jurisdiction of the Circuit Court of Appeals, on the ground that we appealed from a portion of the judgment.

A. It is claimed this cannot be done in the absence of statute, and counsel assert "we know of no act of Congress permitting it". For counsel's edification we quote part of Rule of Civil Procedure 73(b):

> "The notice of appeal * * * shall designate the *judgment or part thereof* appealed from * * *." (Italics added.)

The Rules of Civil Procedure were authorized by Act of Congress (28 USCA 723b, 723c) and have the force of statute. (28 USCA 723b.)

Carter v. Powell, 104 Fed. (2d) 428, 430, 431, confirms the right under this rule, to appeal from part of a judgment.

The intention of the notice of appeal is clear. A judgment for the plaintiff decides two things: (1) liability, (2) amount of damages. Plaintiff obviously does not want to appeal from the favorable decision on the issue of liability. Had it done so defendants

would probably have moved to dismiss the appeal as being taken from a judgment in favor of cross-appellant. (Cf. *Galloway v. Gen. Motors Acc. Corp.,* 106 Fed. (2d) 466, cited at page 3 of cross-appellees' brief.) This last cited case, taken together with *Carter v. Powell, supra,* is decisive in cross-appellant's favor. The two hold *first* that the new rules generally authorize appeal from part of a judgment; *second,* that appeal from the part awarding damages is proper where judgment is for the plaintiff but the plaintiff wants to question the amount of damages.

B. Counsel also make two specific contentions.

1. First they claim that the right to appeal from "part of a judgment" applies only to a definitely severable part. But *Galloway v. Gen. Motors Acc. Corp.,* 106 Fed. (2d) 466, would seem to answer this despite cross-appellees' attempts to distinguish the case.

Bank of Visalia v. Curtis, 131 Cal. 178, is also cited to this point at page 3. In the first place, it is a state case and therefore not in point. In the second place, its holding is distinguishable. It was decided in 1901—at a time when California procedure still allowed an appeal from an order denying a new trial in civil cases. The opinion (131 Cal. 178, 179) says that the appellant's point could have been raised on a motion for a new trial (and therefore on appeal from denial of a new trial) rather than on appeal from the judgment. An appeal from part of the judgment did not change this. If California decisions are relevant, the

latest on the subject is *Adams v. Talbott,* 20 Cal. (2d) 415, 417. It holds that notices of appeal are liberally construed to secure a hearing on the merits.

Under the above authorities cross-appellant's procedure was correct. A plaintiff, appealing from a partial judgment in his favor, appeals from that part relating to the issue of damages.

2. Counsel also claim that our specific points cannot be argued *first,* because they are intermediate rulings, and *second,* because they were not specifically named in the notice of appeal. (Cross-Appellees' Br. pp. 3-4.) But an appeal from a final judgment brings up for review all intermediate rulings which produced the judgment:

> *Roth v. Hyer,* 142 Fed. (2d) 227, 228 (CCA 5).
>
> "The final judgment (or such interlocutory one as may be appealed from) is the judgment to be designated under Rule of Civil Procedure 73(b); but *the appeal draws in question all rulings of the court that produced the judgment.*" (Italics added.)

The present cross-appeal taken from the judgment relating to damages, draws in question all rulings upon the issue of damages.

C. *Summary.* The Circuit Court of Appeals has jurisdiction of the cross-appeal. The notice appealed from the judgment insofar as it fixed damages. That was the only part of the judgment from which the plaintiff *could* appeal. It drew into question all rulings upon the issue of damages.

II. ISSUE OF DAMAGES SHOULD HAVE BEEN SUBMITTED UPON BASIS OF 60,000 CASES.

This subdivision deals with the construction of the contract between the parties, primarily with clause Third.

A. In our opening brief we said that defendants (cross-appellees) stressed the words "subject to negotiations between the parties" to the exclusion of all the rest of the contract. (Cross-Appellant's Op. Br. pp. 9, 12.) Defendants now confirm our statement. On cross-appellees' brief, page 5, they quote the last paragraph of clause Third, but print the word "negotiations" in bold-face type. On page 6 they give their interpretation:

> "* * * the contract is not silent, but instead shows how the price is to be arrived at: it is to be 'subject to negotiation between the parties'."

In short counsel treat this language as controlling, regardless of the remainder of the contract. *They want the phrase "subject to negotiations between the parties" construed independently of its context.*

To state the proposition is to refute it.

On pages 10-15 of cross-appellant's opening brief we gave a detailed analysis of the contract as a whole and especially of clause Third. We showed that the correct interpretation of the word "negotiations" was—"calculations of future cost levels". (Cross-Appellant's Op. Br. p. 20.)

Defendants do not mention much less try to answer this analysis. They do not even give evidence of hav-

ing read that part of our brief. At pages 10 and 11 they try to answer what they seem to believe might be our contention. They draw our conjectural position from their own imagination, instead of getting our real position from our brief. Cross-appellees say:

> "and similarly at bar it is impossible 'to eliminate' the contract provision that the price of 33,309 cases was to be subject to future 'negotiations between the parties'."

This quotation reiterates cross-appellees' attempt to take the words "subject to negotiations" out of their context. But if counsel had read our brief, they would know that we have never tried to "eliminate" their language. Instead we have tried to show its relation to the rest of the contract (Cross-Appellant's Op. Br. pp. 10-15) and the proper meaning which it takes on when read in the light of surrounding provisions. As stated above, this meaning is "calculations of future cost levels".

B. Defendants not only do not answer this analysis but disregard it in their discussion of legal authorities.

1. All the authorities which they cite in their own behalf (Cross-Appellees' Br. pp. 6-12) are cases where the contracts provided for negotiations *and nothing further*. These cases might be in point if counsel were correct in their implied contention that the present contract contains nothing more on the subject than the words "but subject to negotiations between the parties". As we have shown the contract contains much more and is much more specific. Since counsel's treat-

ment of the facts is incorrect, their cases are likewise inapplicable.

2. The same thing is true of cross-appellees' attempts to distinguish plaintiff's citations. This is particularly true of *Kann v. Wausau Abrasives,* 81 N. H. 535, 129 Atl. 374, as to which counsel say "the price was not to be subject to negotiations, but was to depend on the ascertainment of facts". (Cross-Appellees' Br. p. 13.) In the present case we have shown that *subsequent clauses of the contract limit "negotiations" to such an extent as to make the word equivalent to ascertainment of facts.*

Similarly the circumstance that the prices in *Allen v. Sams,* 120 S. E. 808, were to be fixed from the Cotton Exchange or from any other method of determining future prices would be a distinction only on the theory that the present contract is governed by the words "subject to negotiations" to the exclusion of all the rest of its text. But, as we have shown the contract really contemplates calculation of future cost levels. These may be obtained from price indexes similar to quotations upon the exchange, or directly from exchange quotations. So when the contract in the instant case is given its true interpretation, it contemplates ascertaining prices in a manner substantially like that in *Allen v. Sams.*

U. S. v. Swift & Co., 270 U. S. 124, 70 L. Ed. 497, was not based upon regular usage and formula in the past. Its *ratio decidendi* is contained in the passage quoted on pages 16-17 of cross-appellant's opening brief.

Counsel's attempts at distinguishing our other citations (Cross-Appellees' Br. p. 13) likewise do nothing more than to point out that in those cases prices were to *be fixed from ascertainable facts.* But once it is recognized that the 1945 prices in the present contract were to be fixed from ascertainable facts, this point becomes a point of similarity rather than of distinction.

C. The crux of this part of the case is whether the words "subject to negotiations between the parties" should be read by themselves, or whether they should be read together with the rest of the contract. On pages 10-15 of our opening brief we showed that the words should be read together with the rest of the contract and also showed the specific meaning which they took on when this was done. *Cross-appellees leave this section of our brief unanswered.* They confine themselves to arguments based upon the *assumption* that the phrase about negotiations is alone controlling. Since that is not true, and since our analysis of the contract remains unchallenged, the construction developed by our brief (pp. 10-15) must be accepted. In short, the broad word "negotiations" is defined by the specific provisions which follow it. Thus defined, it means simply "calculations of future cost levels", and comes within the rule of the cases cited by plaintiff. (Cross-Appellant's Op. Br. pp. 16-19.) The price for the unbottled part of the wine was therefore fixed definitely enough and the Court should have instructed on the basis of 60,000 cases.

D. On pages 14-16 counsel try to build a separate section upon the case of *Watts v. Weston,* 62 Fed. 136. In the first place, this case merely states defendants' original contention in a different way. Instead of saying that where the price is left wholly to future negotiations, the contract is void for lack of a price, it says that where there is no determinable price, there is no basis for calculating damages. (See comment on *Watts v. Weston* in *Crichfield v. Julia,* 147 Fed. 65, 72. The Second Circuit decided both cases.) Like cross-appellees' other cases it is based on the assumption that there is no ascertainable price. We have shown the contrary. Under the present contract as properly construed, this case is just as irrelevant as defendants' other cases.

E. At pages 16-18 cross-appellees return to the arguments which we mentioned at pages 20-22 of our opening brief. Cross-appellees' contentions are two-fold.

On the one hand they say (p. 17):

> "They (cross-appellants) assert that 'the standard was set forth with particular care in the modifying letter attached to the contract'. The trouble with those assertions is that they are simply false. All that the 'modifying letter' of February 3, 1943 says about the matter is that the 26,691 cases then in existence 'are to the best of our knowledge vintage wines of 1937 and 1938, and that they were produced and bottled by the California wine association'. *That is merely a description of the wine then in existence.*" (Italics added.)

See also cross-appellees' brief, page 18, attempting to distinguish *Goodlove v. Russell.* Here counsel seem to think that the controlling point is whether the modifying agreement (R. 82-3) set a standard of quality or merely contained a description. Assuming this criterion to be sound, it does not benefit the cross-appellees. For both the specific provisions of the instrument and general principles of construction support the construction that the modifying agreement was intended to make representations of quality.

In the first place, the amendatory agreement was *specially drafted* on February 3 (R. 82), five days after the main contract had been drawn up. It is unlikely that the parties would have gone to this extra trouble merely to describe wines about whose identity there was not the slightest question. The fact that the agreement of February 3 was sent as a supplement indicates that it was meant to contain *representations* not included in the original contract. This is particularly clear from its third clause (R. 82) which forms a basis for labelling by plaintiff:

> "That the wines purchased have been produced and bottled by the California Wine Association *and that an inscription bearing these words can be placed upon the labels.*" (Italics added.)

In other words, a representation is made in reliance on which the buyer could draw his labels. Thus the modifying agreement itself indicates it was intended as a representation and not merely as a description.

In the second place, the modifying agreement, like the main agreement, was drafted by the defendants.

(R. 82-3.) It is subject to the same rules of interpretation mentioned in our opening brief; it must be construed (a) in favor of validity and (b) against the defendants.

So if its validity depends upon whether the statements in the modifying agreement constitute representations or mere descriptions, we must take the alternative making for a valid contract. According to defense counsel the alternative which makes the contract valid is construing the letter of February 3 as a series of representations.

On the other hand, counsel make the general argument that contracts are not valid if they leave one side free to perform or not to perform as he chooses. *Brown & Sons v. White Lunch Co.,* 92 Cal. App. 457, and *County of Alameda v. Ross,* 32 Cal. App. (2d) 135, 145, are cited. Both of these cases state mere general principles. They were not concerned with *approval by the buyer.* Consequently they do not touch the proposition that the right of disapproval cannot be exercised capriciously and therefore does not give the buyer an uncontrolled right of rejection. See quotation from *Goodlove v. Russell,* 184 Ore. 445, 293 Pac. 936, at cross-appellant's opening brief, pages 21-22.

This holding is again fortified by the rule that a contract must be construed to give it validity.

Since the contract was definite both as to price and in its preacceptance provisions, it was error to withdraw the unbottled wine from the consideration of the jury.

III. ALTERNATIVELY THE COURT SHOULD HAVE INSTRUCTED ON BASIS OF THE QUANTITIES SOLD IN 1943 AND 1944. (Cross-Appellees' Br. pp. 18-21.)

Section II of cross-appellees' brief indicates that they have read neither our brief nor the record.

A. They complain that our alternative position on number of cases is an "afterthought" and that the point was never made at the trial.

On the contrary, the point was made in plaintiff's requests for instructions 1A, 15A and 16A all of which the Court refused, and to the refusal of which the plaintiff excepted. Each of these three requests, as well as plaintiff's exceptions, are printed in the appendix to cross-appellant's opening brief:

1A is at pages i-ii;
15A is at page iii;
16A is at page v.

The Court's announced refusal to give these instructions is printed at page viii and the exceptions at pages viii-ix. Plaintiff's Instruction 1A is typical and we quote the introduction and last paragraph:

> "(If Instruction No. 1 is not given as is *respecting number of cases* plaintiff proposes the following *alternative* instruction):
> * * * * * * *
> "The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract to sell and deliver *one carload a month during the years of 1943 and 1944 and one additional car per month during the holidays of said years if so desired by plaintiff.*" (Italics added.)

Plaintiff's request No. 1 had asked the Court to tell the jury that the suit was for failure to deliver 60,000 cases of wine. The above request was an alternative, and poses the alternative theory discussed on pages 22-5 of our opening brief. The same is true of requests 15A and 16A.

B. Counsel argue (Cross-Appellees' Br. p. 20) that we claim the issue should have been submitted on a basis of 37,500 cases *as a matter of law.* A mere reading of our proposed instructions 1A, 15A and 16A is a sufficient answer. The instructions follow the language of the contract. The result in figures was a matter of argument to the jury (as counsel correctly suggest). We made the calculation in our brief in order to show the substantive importance of the point.

C. But counsel spend the greater part of their page 20 in arguing that an application of this part of the contract to the evidence *presented a question of fact for the jury.* They take considerable pains to demonstrate their point.

Such an argument is a virtual confession of error. If there is a question of fact as to how many cases were covered by the 1943 and '44 prices, then *it was clearly erroneous to tell the jury that they were limited to 26,691 cases as a matter of law.* (Cf. Defense Request No. 38 quoted at Cross-Appellant's Op. Br. p. 7.)

Finally at pages 20-21 counsel argue for a construction which would limit the fixed prices to the bottled cases, rather than extending them to all wine sold

until the end of 1944. The most that can be said for this is that it presents an alternative construction to the one set forth on pages 23-5 of cross-appellant's opening brief. But defendants are again faced with the rules that contracts must be construed *in favor of validity* and *against the party who drafted the instrument*. Under this rule the clause must be held controlling which fixes definite prices *"during the year 1944"*.

This circumstance, together with defendants' own insistence that the number of cases involved a question of fact, shows that the Court erred in limiting the number to 26,691.

IV. EVIDENCE OF DEFENDANTS' SALES SHOULD HAVE BEEN ADMITTED. (Cross-Appellees' Br. pp. 21-33.)

On pages 25-34 of the opening brief on the cross-appeal, we showed that the Court should have admitted evidence of the prices which defendants (sellers) obtained when they sold the wine to third parties. Counsel's attempted reply smacks of not having read our briefs. We answer defendants' sub-points in order:

A. *Prejudice from Exclusion.*

In the first paragraph of their page 22, counsel say that exclusion of their resale prices was harmless, because the verdict on that basis would have been less. In the first place, this is figured upon only 22,191 cases which we do not admit to be correct. It is enough to say that we do not agree that 4500 cases should be

deducted as a matter of law, or at all. On a basis of 26,691 cases, defendants resale prices support a higher verdict than the one rendered.

But the main point goes deeper. We have always thought that defendants' "strategy" in this litigation was to try to knock out one measure of damages after another, in the hope of ultimately leaving the plaintiff without any. And that in a case where there is plenty of evidence showing both a breach and injury to the plaintiff.

On the first motion for new trial defendants knocked out (in the trial Court) the measure of damages based upon their own resales; on this appeal they are trying to knock out the measure based upon plaintiff's loss of profits. As we stated in our opening brief, the cross-appeal was taken only to protect plaintiff in the event of a third trial. It keeps alive the issue of the first measure of damages, should it ever be needed. If the present verdict is affirmed on defendants' appeal (as we believe it should be) then of course the alternative measure of damages is of no importance. In the event of an affirmance on defendants' appeal we want the cross-appeal dismissed.

B. Counsel misquote the sentence on page 26 of our opening brief: "were admissible as an alternative measure of damages (as was held on the first trial)". They leave out the parenthesis. It is perfectly true that on the first trial one measure of damages was based on market value. We discuss this phase on pages 32-3 of our cross-appellant's opening brief.

On page 24 counsel repeatedly charge us with "confusion". The real trouble would seem to be that counsel have not read our brief.

Thus they say that there is "confusion" in citing 55 *C. J.* 1161, because that deals with sales by the *buyer*. But in the paragraph immediately following the quotation (Cross-Appellant's Op. Br. p. 28) we note this fact, and explain its relevancy. Cross-appellees' brief would lead one to think that their counsel had never read this paragraph. That is what we do think.

In the same way counsel say we are "confused" in treating a *seller's profit* "as coinciding somehow with a *buyer's loss of profit*". (Br. p. 24.)

But we never spoke of the seller's *profit*. Confusion here is on the side of cross-appellees. Profit means net profit. Seller's *profit* would be the difference between the seller's *purchase* price and the seller's *resale* price. In this case it would be the difference between the price for which the *Bercuts originally acquired the wine,* and the prices for which they sold it. But the Bercuts' purchase price is not in evidence. No one has alluded to their net profit or based any argument upon it. The only thing which cross-appellant offered was the seller's *resale price. Its relevancy is that the resale price obtained by the seller is some evidence of the resale price which could have been obtained by the buyer.* We explained this in our opening brief, page 28 (last par.) and page 31. We also showed that the few cases on the subject support our position. (Cross-Appellant's Op. Br. pp. 29-30.)

C. Lastly counsel claim that damages should have been calculated as of the date of breach rather than the date of delivery.

1. They rely mainly on *Lompoc Produce etc. Co. v. Browne,* 41 Cal. App. 607, implying that this represents the law unchanged by the Sales Act.

But in the first place both earlier and later California cases are to the contrary even before the Sales Act. These were *Meyer v. Sullivan,* 40 Cal. App. 723, 732; *U. S. Trading Co. v. Newmark,* 56 Cal. App. 176, 191, and *Felice & Perrelli C. Co. Inc. v. Walton,* 95 Cal. App. 7, 11, all cited at page 33 of our opening brief.

In the second place, decisions under the Sales Act in other States have definitely adopted the rule that relevant price in anticipatory breach cases is the price *at the date of delivery.*

2. Counsel also contend that the date of breach would apply under C. C. 1787 because (as they say) no date of delivery was fixed. But the modification agreement of February 3 said: "the greatest diligence should be exercised by both parties in order to commence at least *60 days hence.*" This fixes the approximate date.

In *Phillips Sheet & Tin Plate Co. v. W. W. Bayer & Co.,* 133 Md. 49, 105 Atl. 166, on which counsel rely, no date was fixed in advance at all. It was merely said "'specifications: To be given at least 60 days *in advance* of shipping date'." But the shipping date itself was left to be fixed in the future. The present con-

tract provides for performance "at least (not more than?) 60 days *hence*", i.e., *after the date of the instrument*—in short, at an ascertainable date.

Counsel close their brief with some philosophical observations on Prof. Williston's reluctance to accept the doctrine of anticipatory breach. They require no comment.

V. CONCLUSION.

Cross-appellees' brief has not weakened the points made in our opening brief.

Plaintiff's position, as upheld on the first trial, was correct. If for any reason there should be a third trial, it should be had upon the basis outlined upon our cross-appeal.

But if the judgment be affirmed on defendants' appeal (as we believe it should be) then we ask the cross-appeal to be dismissed.

Dated, San Francisco, California,
January 22, 1945.

Respectfully submitted,
ALFRED F. BRESLAUER,
THELMA S. HERZIG,
M. MITCHELL BOURQUIN,
GEORGE OLSHAUSEN,
Attorneys for Plaintiff and Cross-Appellant.